

Richard A. Clark (State Bar No. 39558)
(rclark@pmcos.com)
Steven R. Platt (State Bar No. 245510)
(splatt@pmcos.com)
PARKER, MILLIKEN, CLARK, O'HARA
& SAMUELIAN. P.C.
555 S. Flower Street, 30th Floor
Los Angeles, CA 90071
Telephone: (213) 683-6500
Facsimile: (213) 683-6669

Joe G. Hollingsworth (*pro hac vice* application pending)
(jhollingsworth@hollingsworthllp.com)
Katharine R. Latimer (*pro hac vice* application pending)
(klatimer@hollingsworthllp.com)
Eric G. Lasker (*pro hac vice* application pending)
(elasker@hollingsworthllp.com)
HOLLINGSWORTH LLP
1350 I Street, N.W.
Washington, DC 20005
Telephone: (202) 898-5800
Facsimile: (202) 682-1639

Attorneys for Defendant
MONSANTO COMPANY

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

EDWIN HARDEMAN,

Plaintiff,

v.

MONSANTO COMPANY AND JOHN
DOES 1-50,

Defendant.

Case No.: 3:16-cv-00525-VC

**MONSANTO COMPANY'S NOTICE OF
MOTION TO DISMISS AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
TO DISMISS**

Hearing Date: April 7, 2016

Time: 10:00 a.m.

Judge: Hon. Vince Chhabria

Courtroom: 4, 17th Floor

TABLE OF CONTENTS

	Page
NOTICE OF MOTION TO DISMISS	1
MEMO OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS	2
I. ISSUES TO BE DECIDED	2
II. INTRODUCTION	2
III. STATEMENT OF RELEVANT FACTS.....	2
IV. ARGUMENT	5
A. Plaintiff’s Failure to Warn Claims Are Preempted Under FIFRA	5
1. FIFRA Expressly Preempts State Labeling Requirements That Differ From Those Required By EPA	6
2. EPA Has Rejected Plaintiff’s State Law Argument That Monsanto Should Be Required to Warn About a Purported Association Between Glyphosate and Cancer or Other Chronic Health Risks.....	8
B. Plaintiff’s Non-Warnings Design Defect Claims Are Barred By Restatement (Second) of Torts § 402A.....	10
V. CONCLUSION	15

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Ackerman v. Am. Cyanamid Co.</i> , 586 N.W.2d 208 (Iowa 1998)	11
<i>Anderson v. Owens-Corning Fiberglas Corp.</i> , 810 P.2d 549 (Cal. 1991)	12
<i>Arias v. DynCorp</i> , 928 F. Supp. 2d 10 (D.D.C. 2013)	4
<i>Artiglio v. Superior Court</i> , 27 Cal. Rptr. 2d 589 (Cal. Ct. App. 1994)	13
<i>Authement v. Ingram Barge Co.</i> , 977 F. Supp. 2d 606 (E.D. La. 2013)	13
<i>Bates v. Dow Agrosciences LLC</i> , 544 U.S. 431 (2005)	passim
<i>Borel v. Fibreboard Paper Prods. Corp.</i> , 493 F.2d 1076 (5th Cir. 1973)	13
<i>Brown v. Superior Court (Abbott Labs.)</i> , 227 Cal. Rptr. 768 (Cal. Ct. App. 1986), review granted and opinion superseded, 723 P.2d 1248 (Cal. 1986), <i>aff'd sub nom. Brown v. Superior</i> <i>Court</i> , 751 P.2d 470 (Cal. 1988)	10, 12, 14, 15
<i>Canifax v. Hercules Powder Co.</i> , 46 Cal. Rptr. 552 (Cal. Ct. App. 1965)	10
<i>Carlin v. Superior Court</i> , 920 P.2d 1347 (Cal. 1996)	11
<i>Daniels v. Combustion Eng'g, Inc.</i> , 583 S.W.2d 768 (Tenn. Ct. App. 1978)	13
<i>Gauthier v. AMF, Inc.</i> , 788 F.2d 634 (9th Cir. 1986)	12
<i>Glover v. BIC Corp.</i> , 6 F.3d 1318 (9th Cir. 1993)	12
<i>Hall v. Ashland Oil Co.</i> , 625 F. Supp. 1515 (D. Conn. 1986)	13
<i>Hufft v. Horowitz</i> , 5 Cal. Rptr. 2d 377 (Cal. Ct. App. 1992)	12

1	<i>In re Syngenta Ag Mir 162 Corn Litig.</i> ,	
2	Nos. MDL 2591, 14-MD-2591-JWL, 2015 WL 5607600 (D. Kan. Sept. 11,	
	2015)	6
3	<i>Johnson v. Am. Standard, Inc.</i> ,	
4	179 P.3d 905 (Cal. 2008)	12
5	<i>Meaunrit v. The Pinnacle Foods Grp., LLC.</i> ,	
6	No. C 09-04555, 2010 WL 1838715 (N.D. Cal. May 5, 2010)	8
7	<i>Mirzaie v. Monsanto Co.</i> ,	
	No. CV 15-04361 DDP (FFMx), 2016 WL 146421 (C.D. Cal. Jan. 12, 2016)	5, 6
8	<i>Mutual Pharm. Co. v. Bartlett</i> ,	
9	133 S. Ct. 2466 (2013)	6
10	<i>Nat. Res. Def. Council v. U.S. E.P.A.</i> ,	
11	735 F.3d 873 (9th Cir. 2013)	7
12	<i>Nathan Kimmel, Inc. v. DowElanco</i> ,	
	275 F.3d 1199 (9th Cir. 2002)	10
13	<i>Oakes v. E.I. Du Pont de Nemours & Co.</i> ,	
14	77 Cal. Rptr. 709 (Cal. Ct. App. 1969)	11, 12
15	<i>Oregon Azaleas, Inc. v. W. Farm Serv., Inc.</i> ,	
16	No. Civ. 00-1348, 2001 WL 34045733 (D. Or. Aug. 20, 2001), <i>aff'd in part</i> ,	
	<i>rev'd in non-relevant part</i> , 65 F. App'x 101 (9th Cir. 2003)	11
17	<i>Ortho Pharm. Corp. v. Chapman</i> ,	
18	388 N.E.2d 541 (Ind. App. 1979)	11
19	<i>Payne v. Soft Sheen Prod., Inc.</i> ,	
20	486 A.2d 712 (D.C. 1985)	13
21	<i>Plenger v. Alza Corp.</i> ,	
	13 Cal. Rptr. 2d 811 (Cal. Ct. App. 1992)	13
22	<i>Purvis v. PPG Indus., Inc.</i> ,	
23	502 So. 2d 714 (Ala. 1987)	13
24	<i>Red v. The Kroger Co.</i> ,	
	No. CV 10-01025, 2010 WL 4262037 (C.D. Cal. Sept. 2, 2010)	6, 10
25	<i>Riegel v. Medtronic, Inc.</i> ,	
26	552 U.S. 312 (2008)	6
27	<i>Ruiz-Guzman v. Amvac Chemical Corp.</i> ,	
28	7 P.3d 795 (Wash. 2000)	13

1	<i>Skaggs v. Clairol Inc.</i> ,	
2	85 Cal. Rptr. 584 (Cal. Ct. App. 1970)	11, 12
3	<i>Smith v. Hartz Mountain Corp.</i> ,	
4	No. 3:12-cv-00662, 2012 WL 5451726 (N.D. Ohio. Nov. 7, 2012).....	7
5	<i>Uptain v. Huntington Lab, Inc.</i> ,	
6	685 P.2d 218 (Colo. App. 1984), <i>aff'd</i> , 723 P.2d 1322 (Colo. 1986)	13
7	<i>Wilgus v. Hartz Mountain Corp.</i> ,	
8	No. 3:12-CV-86, 2013 WL 653707 (N.D. Ind. Feb. 19, 2013)	7
9	STATUTES	
10	Federal Food Drug and Cosmetics Act, 21 U.S.C. § 346a.....	7
11	Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136 <i>et seq.</i>	<i>passim</i>
12	OTHER AUTHORITIES	
13	40 C.F.R. § 152.112(f)	7
14	40 C.F.R. § 156.10(i)(1)(i)	7
15	40 C.F.R. § 156.60	7
16	<i>Agriculture Biotechnology: A Look at Federal Regulation and Stakeholder</i>	
17	<i>Perspectives: Hearing Before the S. Comm. on Agr., Nutrition, & Forestry,</i>	
18	114th Cong. (2015) (statement of Dr. William Jordan, Deputy Director of	
19	EPA's Office of Pesticide Programs) (statement of Dr. Ronald Kleinman,	
20	Physician in Chief at Massachusetts General Hospital for Children),	
21	http://www.ag.senate.gov/templates/watch.cfm?id=74793e67-5056-a055-64af-	
22	0e55900753b4	4, 9, 15
23	David G. Owen, The Puzzle of Comment J, 55 <i>Hastings L.J.</i> 1377 (2004)	11
24	Dwight D. Lingenfelter, Penn State Extension, <i>Introduction to Weeds: What are</i>	
25	<i>Weeds and Why Do We Care?</i> , http://extension.psu.edu/pests/ipm/schools-	
26	childcare/schools/educators/curriculum/weeds/ introweeds	3
27	E.C. Oerke, <i>Crop losses to pests</i> , 144 <i>J. Agric. Sci.</i> 31 (2006)	3
28	EPA, <i>About Pesticide Registration</i> , http://www2.epa.gov/pesticide-	
	registration/about-pesticide-registration	7
	EPA, <i>Glyphosate: Reregistration Eligibility Decision (RED) Fact Sheet</i> , at 2	
	(September 1993),	
	http://archive.epa.gov/pesticides/reregistration/web/pdf/0178fact.pdf	9
	Fed. R. Civ. P. 12(b)(6).....	2, 15

1	Gary M. Williams et al., <i>Safety Evaluation and Risk Assessment of the Herbicide Roundup and Its Active Ingredient, Glyphosate, for Humans</i> , 31 Reg. Toxicology & Pharmacology 117 (2000)	3
3	Glyphosate; Pesticide Tolerance, 69 Fed. Reg. 65,081, 65,086 (Nov. 10, 2004) (to be codified at 40 C.F.R. pt. 180)	9
5	Glyphosate; Pesticide Tolerances, 67 Fed. Reg. 60,934, 60,943 (Sept. 27, 2002) (to be codified at 40 C.F.R. pt. 180)	9
7	Glyphosate; Pesticide Tolerances, 73 Fed. Reg. 73,586, 73,589 (Dec. 3, 2008) (to be codified at 40 C.F.R. pt. 180)	9
8	Glyphosate; Pesticide Tolerances, 78 Fed. Reg. 25396, 25398 (May 1, 2013) (to be codified at 40 C.F.R. pt. 180)	9
10	IARC, <i>Chinese-style Salted Fish</i> , Vol. 100E (2012), http://monographs.iarc.fr/ENG/Monographs/vol100E/mono100E-12.pdf	5
12	IARC, <i>Consumption of Alcoholic Beverages</i> , Vol. 100E (2012), http://monographs.iarc.fr/ENG/Monographs/vol100E/mono100E-11.pdf	5
13	IARC, <i>Dry Cleaning</i> , Vol. 63 (1995), http://monographs.iarc.fr/ENG/Monographs/vol63/mono63-5.pdf	5
15	IARC, <i>High-temperature Frying</i> , Vol. 95 (2010), http://monographs.iarc.fr/ENG/Monographs/vol95/mono95-7.pdf	5
17	IARC, <i>IARC Monographs Evaluate Consumption of Red Meat and Processed Meat</i> (Oct. 26, 2015), http://www.iarc.fr/en/mediacentre/pr/2015/pdfs/pr240_E.pdf	5
19	IARC, <i>IARC Monographs on the Evaluation of Carcinogenic Risk to Humans Preamble</i> (Jan. 2006), http://monographs.iarc.fr/ENG/Preamble/currenta2objective0706.php	4
21	<i>IARC Monographs Questions and Answers</i> (2015), http://www.iarc.fr/en/mediacentre/iarcnews/pdf/Monographs-Q&A.pdf	4
23	IARC, <i>Shiftwork</i> , Vol. 98 (2010), http://monographs.iarc.fr/ENG/Monographs/vol98/mono98-8.pdf	5
24	Jan M. Lucht, <i>Public Acceptance of Plant Biotechnology and GM Crops</i> , 7 Viruses 4254, 4255 (2015)	14
26	Keith R. Solomon et al., <i>Coca and Poppy Eradication in Colombia</i> , 190 Revs. of Env'tl. Contamination & Toxicology 43, 106 (2007)	3

1	Keith R. Solomon et al., <i>Human Health and Environmental Risks from the Use of</i>	
2	<i>Glyphosate Formulations to Control the Production of Coca in Colombia:</i>	
3	<i>Overview and Conclusions</i> , 72 J. Toxicology & Env'tl. Health 914, 919 (2009).....	3
4	Letter from EPA Assistant Administrator Stephen L. Johnson to Secretary of State	
5	Colin Powell, dated Aug. 19, 2002,	
6	http://www.state.gov/j/inl/rls/rpt/aeicc/13237.htm	4
7	Matin Qaim & Greg Traxler, <i>Roundup Ready Soybeans in Argentina: Farm Level</i>	
8	<i>and Aggregate Welfare Effects</i> , 32 Agric. Econ. 73 (2005).....	14
9	Restatement (Second) of Torts § 402A.....	2, 10
10	Stephen O. Duke & Stephen B. Powles, <i>Glyphosate: A Once-In-A-Century</i>	
11	<i>Herbicide</i> , 64 Pest. Mgmt. Sci. 319 (2008)	3, 14
12	William S. Curran & Dwight D. Lingenfelter, Penn State Extension, <i>Adjuvants for</i>	
13	<i>Enhancing Herbicide Performance</i> ,	
14	http://extension.psu.edu/pests/weeds/control/adjuvants-for-enhancing-	
15	herbicide-performance	3
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

NOTICE OF MOTION TO DISMISS

TO PLAINTIFF AND HIS COUNSEL AND TO THE CLERK OF THE COURT:

PLEASE TAKE NOTICE that on April 7, 2016 at 10:00 A.M. or as soon thereafter as the matter may be heard in Courtroom 4, 17th Floor, of the above captioned court, located at 450 Golden Gate Avenue, San Francisco, California, the Honorable Vince Chhabria presiding, defendant Monsanto Company (“Monsanto”) will, and hereby does, move for dismissal of all of plaintiff Edwin Hardeman’s claims against Monsanto.

This Motion is made under Federal Rule of Civil Procedure 12(b)(6) on the grounds that (1) all of plaintiff’s claims based on a claim of inadequate warning, no matter how denominated, are preempted under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136 *et seq.*; and (2) all of plaintiff’s non-warning design defect claims are foreclosed pursuant to Restatement (Second) of Torts § 402A comments j and k.

PLEASE TAKE FURTHER NOTICE that this Motion to Dismiss is based upon this Notice and its Memorandum of Points and Authorities, the concurrently-filed Request for Judicial Notice, and such further arguments and evidence as Monsanto may submit with its Reply or as the Court may consider at the hearing of this motion.

DATED: March 1, 2016

Respectfully submitted,

Joe G. Hollingsworth (*pro hac vice*
application pending)
(jhollingsworth@hollingsworthllp.com)
Katharine R. Latimer (*pro hac vice*
application pending)
(klatimer@hollingsworthllp.com)
Eric G. Lasker (*pro hac vice* application
pending)
(elasker@hollingsworthllp.com)
HOLLINGSWORTH LLP
1350 I Street, N.W.
Washington, DC 20005
Telephone: (202) 898-5800
Facsimile: (202) 682-1639

s/ Richard A. Clark
Richard A. Clark (State Bar No. 39558)
(rclark@pmcos.com)
Steven R. Platt (State Bar No. 245510)
(splatt@pmcos.com)
PARKER, MILLIKEN, CLARK, O’HARA
& SAMUELIAN. P.C.
555 S. Flower Street, 30th Floor
Los Angeles, CA 90071
Telephone: (213) 683-6500
Facsimile: (213) 683-6669

Attorneys for Defendant
MONSANTO COMPANY

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS

I. ISSUES TO BE DECIDED

1. Whether plaintiff's warnings-based state law claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.*, as implemented by the Environmental Protection Agency.
2. Whether plaintiff's non-warning design defect claims regarding the alleged inherent carcinogenicity of Monsanto's Roundup[®] products are barred under comments j and k to the Restatement (Second) of Torts § 402A, as adopted under California law.

II. INTRODUCTION

Plaintiff Edwin Hardeman alleges that exposure to Monsanto Company's ("Monsanto") Roundup[®] caused him to develop non-Hodgkin's lymphoma ("NHL"). Roundup[®]'s active ingredient, glyphosate, is the most widely-used weed killer in the United States. Since its introduction in 1974, the U.S. Environmental Protection Agency ("EPA") repeatedly has concluded, including as recently as last year, that exposure to Roundup[®] does not cause cancer. *See infra* at 9.

Plaintiff's arguments fail to state a claim and must be dismissed under Fed. R. Civ. P. 12(b)(6). As an initial matter, plaintiff's warnings-based claims, whether brought under negligence, strict liability, or breach of implied warranty theories (claims I, III, and IV in plaintiff's Amended Complaint) are preempted under FIFRA. Second, because plaintiff's claims rest upon the alleged inherent carcinogenicity of Roundup[®] products, his non-warnings-based design defect claim (claim II) is precluded in California by comments j and k to the Restatement (Second) of Torts § 402A. For these reasons, as set forth more fully herein, plaintiff's complaint should be dismissed in its entirety.

III. STATEMENT OF RELEVANT FACTS

The ability to feed the world's growing population while the amount of available farmland continues to dwindle is key to preventing a global humanitarian, agricultural, and economic crisis.

1 Weeds reduce essential crop yield by displacing and contaminating crops, or rendering crops
2 inedible. Herbicide use can prevent over 70% of potential crop yield losses due to weeds.¹

3 Glyphosate is “the most important herbicide” developed in the post-World War II era.²
4 Glyphosate-based herbicides first became commercially available in 1974 when, after four years
5 of testing by its research scientists, Monsanto introduced Roundup[®], a mixture of glyphosate and
6 surfactants (chemical compounds commonly found in products such as soaps that allow
7 glyphosate to travel on the surface of the weed to growing areas).³ Farmers apply Roundup[®]
8 before crops are planted or, where glyphosate resistant seed is used, during the growing process.

9 As documented in numerous scientific analyses, glyphosate is not toxic to humans or
10 animals.⁴ EPA, which has broad authority to regulate all herbicides under FIFRA, has for
11
12

13 ¹ E.C. Oerke, *Crop losses to pests*, 144 J. Agric. Sci. 31, 38 (2006). In economic terms, the
14 average estimated annual monetary loss—including losses in field crops, damage to farming
15 equipment, and increased crop production costs—caused by weeds would exceed \$15 billion in
16 the United States alone in the absence of herbicides. See Dwight D. Lingenfelter, *Introduction to*
17 *Weeds: What are Weeds and Why Do We Care?*, PennState Extension,
18 <http://extension.psu.edu/pests/ipm/schools-childcare/schools/educators/curriculum/weeds/introweeds> (“In 1991, the estimated average annual monetary loss caused by weeds with current control strategies in the 46 crops grown in the United States was \$4.1 billion. If herbicides were not used, this loss was estimated to be \$19.6 billion. Losses in field crops accounted for 82% of this total (Bridges; WSSA, 1992).”).

19 ² Stephen O. Duke & Stephen B. Powles, *Glyphosate: A Once-In-A-Century Herbicide*, 64 Pest
20 Mgmt. Sci. 319, 319 (2008) [hereinafter *Glyphosate: A Once-In-A-Century Herbicide*].

21 ³ See William S. Curran & Dwight D. Lingenfelter, *Adjuvants for Enhancing Herbicide*
22 *Performance*, Penn State Extension, <http://extension.psu.edu/pests/weeds/control/adjuvants-for-enhancing-herbicide-performance>.

23 ⁴ See Keith R. Solomon et al., *Human Health and Environmental Risks from the Use of*
24 *Glyphosate Formulations to Control the Production of Coca in Colombia: Overview and*
25 *Conclusions*, 72 J. Toxicology & Env'tl. Health 914, 919 (2009); Keith R. Solomon et al., *Coca*
26 *and Poppy Eradication in Colombia: Environmental and Human Health Assessment of Aerially*
27 *Applied Glyphosate*, 190 Revs. Env'tl. Contamination & Toxicology 43, 106 (2007); Gary M.
28 Williams et al., *Safety Evaluation and Risk Assessment of the Herbicide Roundup and Its Active*
Ingredient, Glyphosate, for Humans, 31 Reg. Toxicology & Pharmacology 117, 129 (2000)
(reviewing over 188 documents either in published scientific literature or submitted to regulatory agencies assessing the safety of glyphosate, and concluding that glyphosate “is considered to be practically nontoxic by all these routes of exposure”).

1 decades found glyphosate to be “one of the most safely-used pesticides in the U.S.”⁵ and
 2 repeatedly has concluded that glyphosate exposure does not cause cancer. As recently as October
 3 21, 2015, Dr. William Jordan, Deputy Director of EPA’s Office of Pesticide Programs, testified
 4 before a Senate Committee that EPA’s current safety evaluation of glyphosate, announced in
 5 April 2015, confirms that scientific literature “does not provide evidence to show that
 6 [g]lyphosate causes cancer and does not warrant any change in EPA’s cancer classification for
 7 [g]lyphosate.”⁶ The one federal court to consider allegations regarding the carcinogenicity of
 8 glyphosate in a personal injury suit rejected those allegations as lacking reliable scientific
 9 support. *See Arias v. DynCorp*, 928 F. Supp. 2d 10, 24-25 (D.D.C. 2013) (excluding as
 10 unreliable expert’s causation opinion that glyphosate-based herbicides have carcinogenic effects).

11 Plaintiff ignores this record of safety and instead relies on the International Agency for
 12 Research on Cancer’s (“IARC”) recent “cancer hazard” listing of glyphosate as a “probable
 13 carcinogen.” IARC is located in Lyon, France; it is not a regulatory agency, and none of its
 14 determinations are binding on any country. Although IARC purports to “identify cancer
 15 hazards,” it acknowledges that its methodology allows for the designation of a substance as a
 16 “probable” carcinogen “even when risks are very low with known patterns of use or exposure.”⁷
 17 For example, IARC does not take into account levels of exposure, methods of exposure, or other
 18 factors central to a determination of whether a substance can actually cause cancer in humans
 19 under real world exposure scenarios.⁸ Based on this same methodology, IARC has classified a
 20 wide variety of commonly-used substances and exposures as “probable” or “known” carcinogens,

21 ⁵ Letter from EPA Assistant Administrator Stephen L. Johnson to Secretary of State Colin Powell
 22 dated Aug. 19, 2002, <http://www.state.gov/j/inl/rls/rpt/aeicc/13237.htm>.

23 ⁶ *See Agriculture Biotechnology: A Look at Federal Regulation and Stakeholder Perspectives:*
 24 *Hearing Before the S. Comm. on Agr., Nutrition, & Forestry*, 114th Cong. (2015) (statement of
 25 Dr. William Jordan, Deputy Director of EPA’s Office of Pesticide Programs),
 26 <http://www.ag.senate.gov/templates/watch.cfm?id=74793e67-5056-a055-64af-0e55900753b4>, at
 27 time stamp 55:05 – 56:20 (“EPA 2015 Desk Statement”).

28 ⁷ *See IARC Monographs Questions and Answers*, 3 (2015), <http://www.iarc.fr/en/media-centre/iarcnews/pdf/Monographs-Q&A.pdf>.

⁸ *See IARC, IARC Monographs on the Evaluation of Carcinogenic Risks to Humans Preamble*, 2
 (Jan. 2006), <http://monographs.iarc.fr/ENG/Preamble/currenta2objective0706.php>.

including bacon, hot dogs, and red meat;⁹ alcoholic beverages;¹⁰ salted fish;¹¹ shiftwork;¹² frying food;¹³ and dry cleaning.¹⁴

Plaintiff alleges that his diagnosis in February 2015 with NHL is the result of exposure to Roundup[®] that was sprayed on his property “beginning in the 1980’s” and “[f]or many years . . . on a regular basis.” Am. Compl. & Jury Demand (“Am. Compl.”), ¶¶ 112-113, ECF No. 6. Plaintiff asserts a variety of claims, all of which revolve around Monsanto’s alleged failure to warn of the risk of cancer. *See id.* ¶¶ 121-187.

IV. ARGUMENT

A. Plaintiff’s Failure to Warn Claims Are Preempted Under FIFRA.

Plaintiff’s claims for failure to warn, whether brought under strict liability, negligence, or breach of implied warranty theories, are preempted by FIFRA—the pervasive federal regulatory scheme implemented by EPA—and by EPA’s repeated determination that glyphosate does not cause cancer. *See* 7 U.S.C. § 136v(b); *Bates v. Dow Agrosiences LLC*, 544 U.S. 431, 454 (2005) (“[A] manufacturer should not be held liable under a state labeling requirement subject to § 136v(b) unless the manufacturer is also liable for misbranding as defined by FIFRA.”); *see also* *Mirzaie v. Monsanto Co.*, No. CV 15-04361 DDP (FFMx), 2016 WL 146421, at *2 (C.D. Cal. Jan. 12, 2016) (citing *Bates* and holding that plaintiffs’ state-law claims regarding Roundup[®]

⁹ IARC, *IARC Monographs Evaluate Consumption of Red Meat and Processed Meat* (Oct. 26, 2015), http://www.iarc.fr/en/mediacentre/pr/2015/pdfs/pr240_E.pdf.

¹⁰ IARC, *Consumption of Alcoholic Beverages*, Vol. 100E (2012), <http://monographs.iarc.fr/ENG/Monographs/vol100E/mono100E-11.pdf>.

¹¹ IARC, *Chinese-style Salted Fish*, Vol. 100E (2012), <http://monographs.iarc.fr/ENG/Monographs/vol100E/mono100E-12.pdf>.

¹² IARC, *Shiftwork*, Vol. 98 (2010), <http://monographs.iarc.fr/ENG/Monographs/vol98/mono98-8.pdf>.

¹³ IARC, *High-temperature Frying*, Vol. 95 (2010), <http://monographs.iarc.fr/ENG/Monographs/vol95/mono95-7.pdf>.

¹⁴ IARC, *Dry Cleaning*, Vol. 63 (1995), <http://monographs.iarc.fr/ENG/Monographs/vol63/mono63-5.pdf>.

1 were preempted under FIFRA because they “would require [Monsanto] to alter its [EPA-
2 approved] label”), *appeal docketed*, No. 16-55228 (9th Cir. Feb. 12, 2016).

3 1. FIFRA Expressly Preempts State Labeling Requirements That Differ From
4 Those Required By EPA.

5 In order to ensure the exclusivity of EPA’s comprehensive regulatory scheme over
6 product labeling, section 136v(b) of FIFRA contains an express preemption clause, which limits
7 the role of states in regulating warnings for pesticides and herbicides. Section 136v(b) provides
8 that states “shall not impose or continue in effect any requirements for labeling or packaging in
9 addition to or different from those required under this subchapter.” The Supreme Court explained
10 that the term “requirements” as used in section 136v(b) reaches beyond positive enactments, such
11 as statutes and regulations, to embrace common-law duties. *Bates*, 544 U.S. at 443.¹⁵ Thus,
12 section 136v(b) preempts any statutory or common-law rule that would impose a warning
13 requirement that diverges from EPA’s labeling decisions under FIFRA. *Id.* at 453-54; *see also*
14 *Mirzaie*, 2016 WL 146421, at *2 (holding that plaintiffs’ false advertising claims regarding
15 Roundup® were preempted because “[t]here can be no dispute that Plaintiffs seek to impose a
16 labeling requirement different or in addition to that required under FIFRA, as the Roundup label
17 to which Plaintiffs object, and which Plaintiffs seek to alter, was approved by the Environmental
18 Protection Agency in 2008”); *Red v. Kroger Co.*, No. CV 10-01025 DMG (MANx), 2010 WL
19 4262037, at *7 (C.D. Cal. Sept. 2, 2010) (holding that pursuant to *Bates*, “a state law labeling
20 requirement would not be pre-empted by FIFRA *only* ‘if it is equivalent to, and fully consistent
21 with’ the applicable FIFRA subchapter”) (emphasis added).¹⁶

22
23 ¹⁵ The U.S. Supreme Court has twice confirmed this interpretation of section 136v(b). In *Riegel*
24 *v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008), the Court cited *Bates* in explaining that FIFRA’s
25 “provision pre-empting state ‘requirements’ pre-empted common-law duties.” 552 U.S. at 324
26 (citing *Bates*). In *Mutual Pharmaceutical Co. v. Bartlett*, the Court reiterated that under *Bates*, a
state common-law claim imposes a “pre-emptable ‘requirement.’” 133 S. Ct. 2466, 2479-80
(2013).

27 ¹⁶ *See also In re Syngenta Ag Mir 162 Corn Litig.*, Nos. MDL 2591, 14-MD-2591-JWL, 2015 WL
28 5607600, at *23 (D. Kan. Sept. 11, 2015) (holding that plaintiffs’ “failure-to-warn claims are
preempted by FIFRA” and thus “dismiss[ing] any claim based on an alleged failure to warn to the

Under FIFRA, a manufacturer seeking to register a herbicide must submit a proposed label and certain supporting data to EPA. *Bates*, 544 U.S. at 438 (citing 7 U.S.C. §§ 136a(c)(1)(C), (F)). Registration constitutes “prima facie evidence that the [herbicide], its labeling, and packaging comply with [FIFRA’s] registration provisions.” 7 U.S.C. § 136a(f)(2). “In evaluating a [herbicide] registration application, [EPA] assess[es] a wide variety of potential human health and environmental effects associated with use of the product [including] [p]otential human risk[] . . . [of] cancer.”¹⁷ EPA “evaluate[s] and approve[s] the language that appears on each [herbicide] label to ensure the directions for use and safety measures are appropriate to any potential risk.” *Id.*; *see also* 40 C.F.R. § 156.10(i)(1)(i); 40 C.F.R. § 156.60. EPA will approve a pesticide application only if “[t]he Agency has determined that the product *is not misbranded* as that term is defined in FIFRA . . . and its labeling and packaging comply with the applicable requirements of the Act.” 40 C.F.R. § 152.112(f) (emphasis added).

Moreover, in determining whether to register a pesticide under FIFRA, EPA also must consider whether the pesticide is safe under section 408 of the Federal Food Drug and Cosmetics Act (“FDCA”). This assessment includes the safety of tolerance levels for pesticide chemical residues in or on a food. 21 U.S.C. § 346a(b)(2)(A)(i). A residue tolerance is deemed “safe” only if EPA “determine[s] that there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.” 21 U.S.C. § 346a(b)(2)(A)(ii); *see Nat. Res. Def. Council v. E.P.A.*, 735 F.3d 873, 885 (9th Cir. 2013) (discussing EPA safety assessment under section 408 of FDCA).

extent that such claim is based on a lack of warnings in materials accompanying the products”); *Wilgus v. Hartz Mountain Corp.*, No. 3:12-CV-86, 2013 WL 653707, at *6-7 (N.D. Ind. Feb. 19, 2013) (citing *Bates* and holding that where plaintiffs’ complaint directly challenged the labeling of the product and alleged that the defendants failed to adequately warn of potential dangers associated with it, plaintiffs’ claims were preempted by FIFRA); *Smith v. Hartz Mountain Corp.*, No. 3:12-cv-00662, 2012 WL 5451726, at *2-3 (N.D. Ohio Nov. 7, 2012) (same).

¹⁷ *See* EPA, *About Pesticide Registration*, <http://www2.epa.gov/pesticide-registration/about-pesticide-registration>.

1 Unlike with claims of efficacy such as those that were at issue in *Bates*, EPA may not
 2 waive an applicant's data requirements pertaining to the human safety of a herbicide.¹⁸ EPA
 3 cannot register a herbicide or approve its labeling unless the agency concludes that the herbicide
 4 "will perform its intended function without unreasonable adverse effects on the environment,"
 5 including human health. 7 U.S.C. § 136a(c)(5)(C); 7 U.S.C. § 136(bb) (defining "unreasonable
 6 adverse effects on the environment" to include human health risks). As *Bates* explains, EPA's
 7 decision to stop evaluating pesticides for efficacy was specifically based upon its need to devote
 8 its resources to assessing potential environmental and health risks. *See Bates*, 544 U.S. at 440.

9 2. EPA Has Rejected Plaintiff's State Law Argument That Monsanto Should
 10 Be Required to Warn About a Purported Association Between Glyphosate
and Cancer or Other Chronic Health Risks.

11 Here, plaintiff alleges under negligence, strict liability, and breach of implied warranty
 12 theories that because Monsanto failed to "adequately inform and warn Plaintiff of the serious and
 13 dangerous risks associated with the use of and exposure to glyphosate and/or Roundup, including,
 14 but not limited to, the risk of developing NHL," he was eventually diagnosed with NHL. Am.
 15 Compl. ¶ 96; *see also id.* ¶¶ 114, 131, 154, 164, 187. In total, plaintiff alleges a "failure to warn"
 16 in nineteen paragraphs in the claims section of the Complaint. *See, e.g., id.* ¶ 127(b) (alleging
 17 under the Negligence claim that Monsanto "[f]ailed to accompany their product with proper
 18 and/or accurate warnings regarding all possible adverse side effects associated with the use of
 19 Roundup"); ¶ 160 (alleging under the Strict Liability claim that "[t]he defective condition of
 20 Roundup was due in part to the fact that it was not accompanied by proper warnings regarding its
 21
 22

23 ¹⁸ *See* 7 U.S.C. § 136a(c)(5) ("the Administrator may waive data requirements pertaining to
 24 efficacy"); *cf. Bates*, 544 U.S. at 440 (basing decision not to preempt claims based upon alleged
 25 inefficacy of herbicide on fact that EPA "had 'stopped evaluating pesticide efficacy for routine
 26 label approvals almost two decades ago'"); *see also Meaunrit v. Pinnacle Foods Grp., LLC.*, No.
 27 C 09-04555 CW, 2010 WL 1838715, at *10 (N.D. Cal. May 5, 2010) (noting that *Bates* ruling
 28 was based on EPA's lack of review of efficacy claims and preempting claims that challenged
 federal safety determinations under express preemption clauses in federal statutes identical to
 preemption clause in FIFRA).

1 carcinogenic qualities and possible side effects, including, . . . developing non-Hodgkin's
2 lymphoma . . .").¹⁹

3 Plaintiff's allegations are directly contradicted not only by EPA's prior express approvals
4 of the product and product label but also by EPA's consistent findings that glyphosate is *not*
5 carcinogenic to humans.²⁰ Specific findings of safety include:

- 6 • "In June 1991, EPA classified glyphosate as a Group E [carcinogen]—one that shows
7 evidence of non-carcinogenicity for humans—based on the lack of convincing evidence of
8 carcinogenicity in adequate studies." EPA, *Glyphosate: Reregistration Eligibility*
9 *Decision (RED) Facts*, 2 (Sept. 1993),
<http://archive.epa.gov/pesticides/reregistration/web/pdf/0178fact.pdf>. See Request for
Judicial Notice, Ex. A (filed concurrently).
- 10 • "No evidence of carcinogenicity." Glyphosate; Pesticide Tolerances, 67 Fed. Reg.
11 60,934, 60,943 (Sept. 27, 2002) (to be codified at 40 C.F.R. pt. 180). See Request for
Judicial Notice, Ex. B (filed concurrently).
- 12 • "Glyphosate has no carcinogenic potential." Glyphosate; Pesticide Tolerance, 69 Fed.
13 Reg. 65,081, 65,086 (Nov. 10, 2004) (to be codified at 40 C.F.R. pt. 180). See Request
14 for Judicial Notice, Ex. C (filed concurrently).
- 15 • "There is [an] extensive database available on glyphosate, which indicate[s] that
16 glyphosate is not mutagenic, not a carcinogen, and not a developmental or reproductive
17 toxicant." Glyphosate; Pesticide Tolerances, 73 Fed. Reg. 73,586, 73,589 (Dec. 3, 2008)
(to be codified at 40 C.F.R. pt. 180). See Request for Judicial Notice, Ex. D (filed
concurrently).
- 18 • "EPA has concluded that glyphosate does not pose a cancer risk to humans." Glyphosate;
19 Pesticide Tolerances, 78 Fed. Reg. 25,396, 25,398 (May 1, 2013) (to be codified at 40
C.F.R. pt. 180). See Request for Judicial Notice, Ex. E (filed concurrently).
- 20 • "In 2014, EPA reviewed over 55 epidemiological studies conducted on the possible cancer
21 and non-cancer effects of [g]lyphosate. Our review concluded that this body of research
22 does not provide evidence to show that [g]lyphosate causes cancer and does not warrant
23 any change in the EPA's cancer classification for [g]lyphosate." EPA 2015 Desk
Statement at time stamp 55:17-55:37. See Request for Judicial Notice, Ex. F (filed
concurrently).

24
25
26 ¹⁹ See also Am. Compl. ¶¶ 124(f), 124(g), 124(h), 127, 127(c), 127(d), 127(e), 149, 161, 162,
27 163, 165, 167, 168, 173, 174, 175.

28 ²⁰ See Request for Judicial Notice, Ex. A – F (filed concurrently).

Plaintiff's failure to warn claims seek to impose "labeling requirement[s] different or in addition to" these consistent findings of EPA. *Compare Mirzaie*, 2016 WL 146421, at *2; and *Red*, 2010 WL 4262037, at *7, with, e.g., Am. Compl. ¶ 127(d) (alleging Monsanto is negligent for having "[f]ailed to accompany their product with accurate warnings regarding the risks of all possible adverse side effects concerning Roundup"). Accordingly, plaintiff's warnings-based claims are preempted by FIFRA and must be dismissed.²¹

B. Plaintiff's Non-Warnings Design Defect Claims Are Barred By Restatement (Second) of Torts § 402A.

Plaintiff's design defect claims focus on glyphosate's and/or Roundup®'s alleged "carcinogenic properties." See Am. Compl. ¶¶ 32, 44, 81, 124(d), 167, 168. Plaintiff does not allege that there is an alternative design that would avoid this claimed carcinogenic effect. Rather, he alleges that both glyphosate and Roundup® are inherently and unavoidably dangerous. See, e.g., *id.* ¶ 83 ("[N]umerous human and animal studies have evidenced the carcinogenicity of glyphosate and/or Roundup."); *id.* ¶ 136 ("Roundup was in an unsafe, defective, and inherently dangerous condition, which was dangerous to users. . .") (emphasis added); see *id.* ¶¶ 140, 146, 185 (alleging Roundup® is "inherently dangerous and unsafe," has "established health risks inherent with its normal, intended use," and is sold in an "inherently dangerous condition").

Based on plaintiff's allegations, his design defect claims are governed by the "closely related" comments j and k to the Restatement (Second) of Torts § 402A, and plaintiff is limited to claims that the warnings accompanying the product are deficient. See *Brown v. Superior Court (Abbott Labs.)*, 227 Cal. Rptr. 768, 772-73 (Cal. Ct. App. 1986), review granted and opinion superseded, 723 P.2d 1248 (Cal. 1986), *aff'd sub nom. Brown v. Superior Court*, 751 P.2d 470 (Cal. 1988).²² Thus, plaintiff's non-warnings based claims should be dismissed.²³

²¹ To the extent that plaintiff alleges that these consistent EPA findings of safety are based upon fraud, see, e.g., Am. Compl. ¶¶ 106-108, 124(f), 124(p), 181, 183, plaintiff's claims also are impliedly preempted as impermissible fraud-on-the-agency claims. See *Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1204-06 (9th Cir. 2002).

²² See also *Canifax v. Hercules Powder Co.*, 46 Cal. Rptr. 552, 558 (Cal. Ct. App. 1965) (summarizing comments j and k as stating the rule that "a product, although faultlessly made,

As adopted in California, comments j and k address the class of products that carry unavoidable dangers that cannot be designed away without destroying their utility. David G. Owen, *The Puzzle of Comment J*, 55 Hastings L.J. 1377, 1382 (2004). Such products, “accompanied by proper warnings, are not in a ‘defective condition unreasonably dangerous’ with respect to the unavoidable dangers inherent in products of this type.” *Id.* Comments j and k reflect the policy determination in Section 402A that:

Because there is no way (other than by providing warnings) that manufacturers of such products can minimize the inherent dangers of such products without also destroying their utility, there is no good reason in corrective justice or economics to force manufacturers to insure consumers against risks of harm they have chosen to accept by using products with inherent risks they fully understand.

Id. at 1389.

California courts have specifically applied comment j in cases involving herbicides. *See Oakes v. E.I. Du Pont de Nemours & Co.*, 77 Cal. Rptr. 709, 710, 712-13 (Cal. Ct. App. 1969) (explaining that manufacturer of “weed-killing [] products” was required to warn only of “special danger[s]” they have knowledge of or “‘by the application of reasonable, developed human skill and foresight’” should have knowledge of).²⁴ Pursuant to comment j, “a product bearing . . . a

may nevertheless be deemed ‘defective’ . . . if it is unreasonably dangerous to place the product in the hands of a user without a suitable warning and the product is supplied and no warnings is given”).

²³ Section 402A is stated as an adjunct of strict liability, and California courts have found that comments j and k also reflect “well settled rules already a part of the law of negligence.” *Skaggs v. Clairol Inc.*, 85 Cal. Rptr. 584, 587 (Cal. Ct. App. 1970) (discussing comment j); *see also Carlin v. Superior Court*, 920 P.2d 1347, 1357-58 (Cal. 1996) (explaining that comment k is based on negligence principles); *Ortho Pharm. Corp. v. Chapman*, 388 N.E.2d 541, 550 (Ind. App. 1979) (citing *Skaggs* for proposition that negligence and strict liability are “functionally interchangeable” under section 402A in cases involving inherently dangerous products).

²⁴ Other courts have done likewise. *See Ackerman v. Am. Cyanamid Co.*, 586 N.W.2d 208, 220-21 (Iowa 1998) (applying comment j in herbicide case and holding that “[u]nder the applicable products liability law, it is clear that if American Cyanamid had placed directions or warnings on its label that, if followed, would have made the product safe for use, the product would not be unreasonably dangerous and liability would be avoided”); *Oregon Azaleas, Inc. v. W. Farm Serv., Inc.*, No. Civ. 00-1348-KI, 2001 WL 34045733, at *4 (D. Or. Aug. 20, 2001), *aff’d in part, rev’d in non-relevant part*, 65 F. App’x 101 (9th Cir. 2003) (applying comment j in rejecting design

1 warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably
 2 dangerous.” *Oakes*, 77 Cal. Rptr. at 712 (quoting comment j); *see also Johnson v. Am. Standard,*
 3 *Inc.*, 179 P.3d 905, 910-11 (Cal. 2008) (applying comment j). Where “there [is] no evidence . . .
 4 that defendant’s product was defectively ‘manufactured,’ in the literal sense of the word,
 5 defendant [can] be found liable under the Restatement rule set forth in comment j to section 402A
 6 only if it *negligently* failed to label its product in such a manner as to warn consumers of the
 7 dangerous ingredient contained therein.” *Skaggs*, 85 Cal. Rptr. at 588 (emphasis in original).²⁵

8 In *Brown v. Superior Court*, the California Supreme Court applied comment k and held
 9 that manufacturers of prescription drugs cannot be held strictly liable for design defect based
 10 upon the theory that the drug was defectively designed. 751 P.2d 470, 479-80 (Cal. 1988).
 11 Rather, a drug manufacturer may be held liable only if “it failed to warn of a defect of which it
 12 either knew or should have known.” *Id.* at 476; *see id.* at 476-77 (adopting comment k as *per se*
 13 rule in cases involving prescription drugs); *see also id.* at 481 (explaining that consistent with
 14 comment j, defendants could not be held liable for failing to warn of “alleged defects in the drug
 15 that were neither known by defendants nor scientifically knowable at the time the drug was
 16 distributed”). The court reasoned that “[p]ublic policy favors the development and marketing of
 17 beneficial new [products], even though some risks, perhaps serious ones, might accompany their
 18 introduction” Thus, “the imposition of a harsher test for liability would not further the
 19 public interest” *Id.* at 479-80.

20 “*Brown’s* logic and common sense are not limited to drugs.” *Anderson v. Owens-*
 21 *Corning Fiberglas Corp.*, 810 P.2d 549, 556 (Cal. 1991). California courts thus have extended
 22 comment k protection to other medical products, including inflatable penile prostheses,²⁶ breast

23
 24 defect claim involving pesticide).

25 ²⁵ “Other courts have also held that where adequate warnings are given, a product is neither
 26 defective nor unreasonably dangerous.” *Gauthier v. AMF, Inc.*, 788 F.2d 634, 635-36 (9th Cir.
 27 1986) (Montana law and citing other cases); *see also Glover v. BIC Corp.*, 6 F.3d 1318, 1323 (9th
 28 Cir. 1993) (Oregon law).

²⁶ *Hufft v. Horowitz*, 5 Cal. Rptr. 2d 377, 378, 383-84 (Cal. Ct. App. 1992).

implants,²⁷ and intrauterine devices.²⁸ Courts in other jurisdictions have applied comment k to chemicals and other compounds, including asbestos-containing insulation,²⁹ benzene,³⁰ cleaning compounds,³¹ perchloroethylene,³² and permanent hair wave products.³³

In *Ruiz-Guzman v. Amvac Chemical Corp.*, the Supreme Court of Washington applied comment k to a pesticide. 7 P.3d 795, 803 n.10 (Wash. 2000), *opinion after certified question answered* 243 F.3d 549 (9th Cir. 2000). The court reasoned that “a determination that pesticides can *never* be unavoidably unsafe products within the ambit of comment k would seem to defy common sense.” *Id.* at 803 (emphasis in original). Accordingly, “a product-by-product approach to the application of comment k [to pesticides] is warranted.” *Id.* The court held that even if “its product cannot be made safer for its intended use, a pesticide manufacturer could demonstrate the product serves an important enough function (e.g., in the realm of food production) so as to justify its unavoidable risks.” *Id.*

Because plaintiff alleges that glyphosate is unavoidably unsafe, his design defect claims are governed by comments j and k, and Monsanto’s only duty is to provide a proper warning. *See Bates*, 544 U.S. at 450 n.25 (“Given the inherently dangerous nature of pesticides, most safety gains are achieved not through modifying a pesticide’s design, but by improving the warnings and instructions contained on its label.”). Notwithstanding its alleged inherent risks, glyphosate use is justified by its significant value to society. According to U.S. Department of Agriculture scientist

²⁷ *Artiglio v. Superior Court*, 27 Cal. Rptr. 2d 589, 593-94 (Cal. Ct. App. 1994).

²⁸ *Plenger v. Alza Corp.*, 13 Cal. Rptr. 2d 811, 818-19 (Cal. Ct. App. 1992).

²⁹ *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1091 (5th Cir. 1973); *Daniels v. Combustion Eng’g, Inc.*, 583 S.W.2d 768, 772 (Tenn. Ct. App. 1978).

³⁰ *Authement v. Ingram Barge Co.*, 977 F. Supp. 2d 606, 615 (E.D. La. 2013); *Hall v. Ashland Oil Co.*, 625 F. Supp. 1515, 1518 (D. Conn. 1986).

³¹ *Uptain v. Huntington Lab, Inc.*, 685 P.2d 218, 220 (Colo. App. 1984), *aff’d*, 723 P.2d 1322 (Colo. 1986).

³² *Purvis v. PPG Indus., Inc.*, 502 So. 2d 714, 718 (Ala. 1987).

³³ *Payne v. Soft Sheen Prods., Inc.*, 486 A.2d 712, 722 (D.C. 1985).

1 Stephen O. Duke, “glyphosate more closely approximates to a perfect herbicide than any other[.]”
2 *Glyphosate: A Once-In-A-Century Herbicide*, at 319.

3 As detailed above, glyphosate is unique in its high specificity towards an enzyme that is
4 essential to plant growth but that is not present in animals or humans. *See id.* No other chemical
5 classes or analogs are capable of targeting the enzyme this way. *Id.* Glyphosate’s unique mode
6 of action also is active on a wide range of plant species. *Id.* The “spectacular” adoption of
7 glyphosate-resistant (“GR”) crops is due to the fact that “the [specific] combination of glyphosate
8 and a GR crop . . . provides better, simpler, cheaper and more flexible weed management than the
9 conventional alternatives.” *Id.* at 322. Plaintiff acknowledges that “Monsanto’s glyphosate
10 products are registered in more than 130 countries and are approved for weed control in more
11 than 100 crops. No other herbicide active ingredient compares in terms of approved uses.” Am.
12 Compl. ¶ 31.

13 The aggregate welfare effects of glyphosate and GR crops are also considerable. For
14 example, in 2001 alone, GR soybeans created more than \$1.2 billion of economic surplus at the
15 global level, with the largest share, 53%, going to consumers. *See* Matin Qaim & Greg Traxler,
16 *Roundup Ready Soybeans in Argentina: Farm Level and Aggregate Welfare Effects*, 32 Agric.
17 Econ. 73, 73 (2005); *see also* Jan M. Lucht, *Public Acceptance of Plant Biotechnology and GM*
18 *Crops*, 7 Viruses 4254, 4255 (2015) (By using crops engineered to be resistant to glyphosate and
19 other herbicides, “[f]armer’s profits increased by 68% on average Crop yields rose by 22%,
20 the expense for pesticides declined by 39%.”).

21 Although plaintiff may allege that glyphosate might have been “made safer if it was
22 withheld from the market until scientific skill and knowledge advanced to the point at which
23 additional dangerous side effects would be revealed,” *see Brown*, 751 P.2d at 479, such a delay
24 *added* to the delay required to obtain approval for release of the product and product label from
25 EPA, “would not serve the public welfare.” *Id.* Moreover, if Monsanto or other manufacturers of
26 herbicide products were subject to strict liability, they might be “reluctant to undertake research
27 programs” to develop beneficial new products, and “the additional expense of insuring against
28 such liability . . . and of research programs to reveal possible dangers not detectable by available

scientific methods” could place the cost of vital herbicide products “beyond the reach of those who need it most” like poor, rural, and developing populations. *See id*; *see also Agriculture Biotechnology*, at time stamp 2:39:28 – 2:40:01 (Statement of Dr. Robert Kleinman, Physician in Chief at Massachusetts General Hospital for Children) (2015) (“[Food insecurity] is often driven by economic limitations and often afflicting the most vulnerable children . . . and the elderly Enhanced, sustainable food production is essential [to addressing this problem] in both the developed and developing world.”); Request for Judicial Notice, Ex. F (filed concurrently).

Given “the public[’s] interest in the development, availability, and reasonable price” of glyphosate, plaintiff’s claims are governed by comments j and k, and Monsanto may only be held liable based upon an alleged failure to warn. *See Brown*, 751 P.2d at 477. Plaintiff’s non-warnings strict liability and negligent design defect claims should be dismissed.

V. CONCLUSION

For the foregoing reasons, this Court should grant this motion and, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismiss this case in its entirety.

DATED: March 1, 2016

Respectfully submitted,

Joe G. Hollingsworth (*pro hac vice*
application pending)
(jhollingsworth@hollingsworthllp.com)
Katharine R. Latimer (*pro hac vice*
application pending)
(klatimer@hollingsworthllp.com)
Eric G. Lasker (*pro hac vice* application
pending)
(elasker@hollingsworthllp.com)
HOLLINGSWORTH LLP
1350 I Street, N.W.
Washington, DC 20005
Telephone: (202) 898-5800
Facsimile: (202) 682-1639

/s/ Richard A. Clark

Richard A. Clark
State Bar No. 39558
(rclark@pmcos.com)
Steven R. Platt
State Bar No. 245510
(splatt@pmcos.com)
PARKER, MILLIKEN, CLARK, O’HARA
& SAMUELIAN, P.C.
555 S. Flower Street, 30th Floor
Los Angeles, CA 90071
Telephone: (213) 683-6500
Facsimile: (213) 683-6669

Attorneys for Defendant
MONSANTO COMPANY